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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 199

FREDERICK D. DISMUKE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 1, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION

No. 474 At Law

FREDERICK D. DISMUKE, Plaintiff-Appellee,

versus

THE UNITED STATES, Defendant-Appellant

[fol. 4] PETITION—Filed April 17, 1934

The petition of Frederick D. Dismuke respectfully shows:

1

The defendant herein is the United States of America, a corporation sovereign.

2

This suit is founded upon the laws of Congress which provide for the retirement of Civil Service employees, enacted on May 22nd, 1920, and found in the United States Code, Title 5, Section 691, et seq., and upon the various amendments to said legislation, as well as upon a contract between petitioner and the Government of the United States, as will be more fully hereinafter shown.

3

Petitioner became an employee of the United States on December 16, 1895, as a deputy United States Marshal and served the United States in such capacity until April 30th, 1902.

4

Petitioner became an employee of the United States on February 7th, 1902, as Postmaster at Thomasville, Georgia, and served the United States in such capacity until May 24th, 1914.

5

Petitioner became an employee of the United States on September 10, 1921, as prohibition officer and served the United States in such capacity until June 30th, 1930.

[fol. 5] 6

On July 1st, 1930, petitioner, still remaining as an employee of the United States, was transferred from the Treasury Department to the Department of Justice and continued to serve the United States as such employee until June 30th, 1933.

7

Between the dates of June 16th, 1933, and July 1st, 1935, to-wit: On June 30th, 1933, petitioner, being then and there an employee of the United States to whom Section 8-A of the Act of Congress approved June 16th, 1933 (Title 5 U. S. C. A., Section 692-D), applies and who had an aggregate period of service of more than thirty (30) years, computed as prescribed in Section 695-A of Title 5 U. S. C. A., was involuntarily separated from the services of the United States for reasons other than his misconduct. The reason for said separation from the services being "due to reduction in force."

8

On June 27th, 1933, petitioner directed a letter to the Director of Insurance, Veterans Administration, asking to be advised the amount of money to be refunded by him under the Retirement Act so as to place petitioner in line for the benefits under said Act and the Veterans Administration required petitioner to deposit the sum of $970.09, which was deposited by petitioner with the Treasurer of the United States on October 26, 1933, to the credit of the Civil Service Retirement and Disability Fund. This sum was the amount which petitioner was required to pay in order to entitle him to the annuity benefits provided by Section 8-A of the Act of Congress approved June 16, 1933, the statutory deductions called for by Section 8 of the Act of May 22nd, 1920, and amendments thereto having already [fol. 6] been deducted from petitioner's salary payments from March 1st, 1928 through June 30th, 1933.

9

From March 1st, 1928, to June 30th, 1928, petitioner, as an employee of the United States, earned a salary of $1,300.00, from which there was deducted by the United States for the Civil Service Retirement Fund 3½% or $45.50.

10

From July 1st, 1928, to December 31, 1928, petitioner, as an employee of the United States, earned a salary of $1,850.00, from which the United States deducted for the Civil Service Retirement Fund 3½% or $64.75.

11

From January 1st, 1929 to June 30th, 1933, petitioner, as an employee of the United States earned a salary of $13,300.00 from which the United States deducted for the Civil Service Retirement Fund 3½% or $466.50.

12

Petitioner has, therefore, in performance of his part of his contract with the United States, paid to the United States the proper amount of the premium for the annuity which the law provides for him, the total amount of $1,545.84, which is the entire amount which the United States has called upon him to pay.

13

When petitioner was in the employ of the United States as a deputy marshal as above alleged, he devoted his entire [fol. 7] time to the duties of that employment, it being a full time employment which required all of petitioner's attention.

14

Shortly after June 30th, 1933, petitioner filed his claim with the Administrator of Veterans Affairs for the annuity under the provision of Section 8-A of the Act of June 16th, 1933, and on or about December 26th, 1933, petitioner received a letter from H. L. McCoy, Director of Insurance, advising that this claim was rejected on the ground that petitioner did not render thirty (30) years of allowable service "the service as a field deputy United

States Marshal from December 16th, 1895, to April 30th, 1902, having been excluded upon the ground that field deputy marshals are regarded as employees of the Marshal and not of the United States." That was the only reason assigned by the Director of Insurance for disallowing petitioner's claim.

15

Shortly after receipt of said letter from the Director of Insurance, petitioner appealed from the decision of said Director to the Administrator of Veterans Affairs and on March 13th, 1934, the Board of Veterans Appeals rendered a decision, denying petitioner's claim for the same reason assigned by said Director of Insurance.

16

Petitioner has exhausted all opportunities available to him for a favorable decision before the Veterans Administration and petitioner alleges that the decision of the Director of Insurance and of the Board of Veterans appeals is arbitrary and capricious and is clearly erroneous for the [fol. 8] only question presented for their determination was a question of law and their decision is contrary to law.

Wherefore, Petitioner prays that process issue, directed to the Defendant, requiring it to be and appear at the next term of this Court to answer Petitioner's complaint and that petitioner have judgment against the Defendant for the amounts due petitioner under Section 8-A of the Act approved June 16th, 1933.

Carlisle & Bootle, Attorneys for Petitioner.

AFFIDAVIT OF SERVICE

Personally appeared before the undersigned attesting officer, W. A. Bottle, who being duly sworn says that he has caused a copy of the within petition to be served upon the District Attorney of the United States for the Middle District of Georgia, and that he has mailed a copy of said petition, with a copy of this affidavit, by registered mail to the Attorney General of the United States.

W. A. Botle.

Sworn to and subscribed before me, this 17th day of April, 1934.

Geo. F. White, Clerk, United States District Court.

ACKNOWLEDGEMENT OF SERVICE

Service of the within petition acknowledged, copy re-
[fol. 9] ceived, further service upon the United States Attorney waived.

This April 18, 1934.

A. Edward Smith, Asst. U. S. Atty.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AMENDMENT TO PETITION—Filed Oct. 26, 1934

Comes now the plaintiff and amends his petition by adding thereto the following paragraphs, to-wit:

17

Petitioner has elected to receive an increased annuity under the forfeiture proviso of Section 4 of the Amendatory Law and is entitled under Section 8 (a) of the Act of June 16, 1933, to receive an annuity in the amount of $1,181.16 per annum ($98.43 per month) from July 1, 1933, and in the amount of $1,224.00 per annum ($102.00 per month) from January 21, 1945, until the date of petitioner's death.

18

Should the Court decide that the time petitioner served as a field deputy marshal cannot be allowed in determining his eligibility to annuity petitioner is nevertheless entitled under Section 7 of the Act of May 29, 1930, to receive an annuity in the amount of $555.60 per annum ($46.30 per month) from July 1, 1933, until the date of petitioner's death.

[fol. 10] 19

Petitioner amends the prayer of the original petition by adding thereto the following, to-wit:

Petitioner prays specifically:

1. For judgment for all of the monthly installments which have accrued to date of judgment; and

2. That this Court, enter a declaratory judgment, declaring petitioner's rights in the premises; namely, that petitioner is entitled, under his annuity contract with the Government of the United States to receive future installments from the United States in the amounts and for the periods, or duration, of time set forth in paragraphs 17 and 18 of this amended petition.

Wherefore, Petitioner prays that this amendment be allowed and ordered filed.

Carlisle & Bootle, Attorneys for Petitioner.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING AMENDMENT

The foregoing amendment allowed and ordered filed this October 22, 1934.

Bascom S. Deaver, United States Judge.

[fol. 11] IN UNITED STATES DISTRICT COURT

ANSWER—Filed June 7, 1934

Comes now the defendant in the above stated case and, subject to its general demurrer heretofore filed therein, and without admitting the jurisdiction of the Court, interposes its plea and answer therein and says:

1

The first paragraph is admitted.

2

The second paragraph is admitted.

3

This third paragraph is denied.

4

For the want of sufficient information, the facts alleged in the fourth paragraph can neither be admitted nor denied, but the defendant demands strict proof thereof.

5

For the same reasons as alleged in paragraph four, the allegations in the fifth paragraph can neither be admitted nor denied, but proof thereof is required.

6

And for the same reasons as above stated, the allegations of the sixth paragraph can neither be admitted nor denied, but strict proof is required.

[fol. 12] 7

The allegations relative to the length of service by petitioner as an employee of the United States as set out in paragraph seven are denied; the other averments therein contained are neither admitted nor denied, but proof thereof is required.

8

For the want of sufficient information, the allegations contained in the eighth paragraph of the petition are neither admitted nor denied, but strict proof thereof is required.

9

For the want of sufficient information, this defendant can neither admit nor deny the allegations contained in paragraphs nine, ten, eleven and twelve, but strict proof of all the allegations therein contained is required.

10

The thirteenth paragraph of the petition is denied, and this defendant says that the said petitioner has never been in the employ of the United States as a Deputy Marshal.

11

For the want of sufficient information, the allegations contained in paragraphs fourteen, fifteen and sixteen can neither be admitted nor denied, but the defendant requires strict proof of all of the material allegations therein contained.

[fol. 13] Wherefore, having fully answered, the defendant prays that it be discharged.

(Signed) T. Hoyt Davis, United States Attorney.
(Signed) H. G. Rawls, Asst. United States Attorney, Attorneys for Defendant.

Duly sworn to by H. G. Rawls. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

DEMURRER—Filed June 7, 1934

Comes now the defendant, the United States, and before [fol. 14] pleading to the merits of this said cause, interposes the following demurrers thereto:

1

Defendant demurs to the petition generally for the reason that the same fails to set forth any cause of action either legal or equitable against the defendant.

2

Because the petition shows upon its face that the District Court of the United States for the Middle District of Georgia, Macon Division, has no jurisdiction to entertain said cause for the reason that said suit is a suit against the Sovereign, and it is not alleged in the petition or otherwise stated that consent to be sued had previously been granted by the said Sovereign.

3

Defendant demurs generally to the said petition for the reason that it affirmatively appears therefrom that the plaintiff's claim, if any he has, is res judicata for the reason that it appears that the same has already been passed upon and denied by the proper authority vested with the power of determining such claims.

Wherefore, defendant prays that these its grounds of demurrer be inquired into by the Court, and that the petition be dismissed.

(Signed) T. Hoyt Davis, United States Attorney.
(Signed) H. G. Rawls, Asst. United States Attorney, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 15] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING DEMURRER—Filed Aug. 31, 1934

After hearing arguments upon the defendant's demurrer to the petition in the above stated case it is hereby ordered that said demurrer be and the same is hereby overruled.

An exception to this order was noted by the defendant and allowed by the Court.

In open Court this 31st day of August, 1934.

Bascom S. Deaver, United States Judge.

Carlisle & Bootle, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

Findings of Facts, Conclusions of Law and Judgment

The above case having come on regularly for hearing the court makes therein the following findings of facts and conclusions of law:

FINDINGS OF FACTS

1. This case is based upon a claim against the United States not exceeding $10,000.00, founded upon the laws of Congress which provide for the retirement of civil service employees enacted on May 22, 1920, and upon the various amendments to said legislation as well as upon a contract between petitioner and the Government of the United States.

[fol. 16] 2. The Court hereby finds the facts to be as stipulated in the agreed statement of facts, upon which the case was tried, and adopts said agreed statement as its findings of fact as far as said agreed statement goes, other evidence having been introduced.

3. The Court hereby finds that throughout the petitioner's service as a field deputy marshal he devoted all of his time to the duties of his said office, having no other occupation and no other income.

4. The duties which petitioner as a deputy marshal performed were in general the same as the duties performed by marshals and deputy marshals today and were pre-

scribed by Acts of Congress and these duties were the same before and after field deputy marshals were placed upon a salary basis.

5. Throughout petitioner's service as a deputy marshal, he along with other deputy marshals, was paid for his services out of funds advanced to the United States Marshal by the United States.

6. Throughout petitioner's period of service as a deputy marshal the amount of his remuneration was prescribed by Acts of Congress, the Attorney General having the right to increase or decrease such remuneration subject to the limitation that such remuneration could not exceed three-fourths of the fees and emoluments received or payable for the services rendered by him. The amount of fees to be charged by deputy marshals for any particular service was prescribed by statute, but the remuneration received by such deputy was not affected one way or the other by the collection or non-collection of such fees or emoluments.

7. During the petitioner's services as a deputy marshal, a United States Marshal could not receive credit for any payment made to a deputy who had not been regularly ap- [fol. 17] pointed and who had not taken the oath of office prescribed by Section 782 of the Revised Statutes.

8. Throughout the period of petitioner's service as a deputy marshal the United States Attorney General issued instructions to the United States Marshals as he does today concerning the manner in which they and their deputies were to discharge their duties.

Conclusions of Law

1

This Court has jurisdiction of this controversy.

2

During petitioner's service as a deputy marshal from December 16, 1895, to April 30, 1902, he was performing services for and was working for the Government of the United States.

3

The purpose and intention of Congress in enacting the statutes relating to the retirement of civil service employees was to provide an annuity for those who had been regularly engaged in working for the Government for the prescribed periods.

4

Petitioner, as a field deputy marshal, was an employee of the United States within the meaning of Section 8 (a) of the Act of June 16, 1933, and the time which he served as a field deputy marshal can be used in determining his eligibility to annuity.

5

Petitioner is entitled to recover from the United States [fol. 18] $98.43 per month from July 1, 1933, to January 21, 1945, and is entitled to receive from the United States $102.00 per month from January 21, 1945, until the date of his death.

JUDGMENT

Whereupon, it is considered, ordered and adjudged that plaintiff, Frederick D. Dismuke, do have and recover of the United States the sum of $1476.45, representing fifteen monthly installments accruing from July 1, 1933, through the month of September 1934.

Petitioner, by his pleadings, having alleged an actual controversy and having asked for a declaratory judgment as well as a coercive judgment by virtue of the Act approved June 14, 1934, authorizing declaratory judgments, the rights of Frederick D. Dismuke, the petitioner, are hereby declared to be as follows:

Petitioner is entitled under his annuity contract to receive from the United States monthly installments of $98.43 from October 1, 1934 until January 21, 1945, and monthly installments of $102.00 from January 21, 1945, until the date of his death.

The coercive judgment in this case takes care of installments through the month of September, 1934, and the next installment due will be for the month of October, 1934, and will be payable on November 1, 1934.

This 25 day of October, 1934.

Bascom S. Deaver, United States Judge.

Exception

Exception noted and allowed. Oct. 25, 1934.
Bascom S. Deaver, Judge.

[fol. 19] In United States District Court

Petition for Appeal—Filed Jan. 17, 1935

Comes now the United States of America, the defendant in the above named and stated case, and feeling aggrieved by the order of the said Court dated August 31, 1934, overruling the defendant's demurrer to the petition in said case, and the judgment in favor of the plaintiff dated October 25, 1934, does hereby appeal said orders and judgments to the Circuit Court of Appeals for the Fifth Circuit for the reasons set forth in the assignment of errors filed herewith, and prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the recorded proceedings and documents upon which said proceedings were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Fifth Circuit, under the rules of such Court in such cases made and provided.

T. Hoyt Davis, United States Attorney. H. G. Rawls, Assistant United States Attorney, Attorneys for Appellant.

[File endorsement omitted.]

In United States District Court

Order Allowing Appeal

The foregoing appeal is hereby granted and allowed, to be effective upon the filing thereof, and said appeal shall serve as a supersedeas.

This 17 day of January, 1935.

Bascom S. Deaver, United States District Judge.

[fol. 20] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Jan. 17, 1935

The United States of America, appellant herein, in connection with its petition for appeal, makes the following assignment of errors, which it appears were committed by the Court in said case:

1. The Court erred in overruling the demurrer of the defendant to the plaintiff's petition.

2. The Court erred in overruling the motion of the defendant for a judgment in its favor at the conclusion of the introduction of the evidence in said case.

Wherefore, appellant prays that the judgment of the said District Court of the United States for the Middle District of Georgia be reversed.

T. Hoyt Davis, United States Attorney, H. G. Rawls, Assistant United States Attorney, Attorneys for Appellant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ACKNOWLEDGMENT OF SERVICE—Filed Jan. 17, 1935

Due and legal service of the foregoing petition for appeal, the order of the Court thereon, and the assignment of [fol. 21] errors is acknowledged. Copy received, and all other and further service is waived.

This 17 day of January, 1935.

Carlisle & Bootle, Attorneys for Appellee.

Post Office Address: Macon, Georgia.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed Jan. 17, 1935

Be it remembered that on the 25th day of October, 1934, there came on to be tried before the Honorable Bascom S.

Deaver, Judge of the District Court of the United States for the Middle District of Georgia, without the intervention of a jury, the above stated cause.

STIPULATION AND AGREED STATEMENT OF FACTS

The following stipulation was entered into:

"It is hereby stipulated and agreed that the above stated case shall be tried upon the following agreed statement of facts, with the privilege to either party to introduce any additional evidence which is competent and relevant to the issue and which is not inconsistent with or contradictory of this agreed statement of facts:

"On December 16, 1895, Frederick D. Dismuke, hereinafter called petitioner, was duly and regularly appointed as a deputy United States marshal for the Northern District of Georgia and on the same date took and subscribed to the United States Deputy Marshal's oath of office, which oath of office was as follows:

[fol. 22] "UNITED STATES OF AMERICA,
Northern District of Georgia, ss:

"I, F. D. Dismuke, Jr., of Griffin, County of Spalding, and State of Georgia, having been appointed on the 16th day of December, 1895, to the Office of United States Deputy Marshal do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter. And I do further solemnly swear that I will faithfully execute all lawful precepts directed to the Marshal of the Northern District of Georgia, under authority of the United States, and true returns make, and in all things well and truly, and without malice or partiality, perform the duties of the office of Marshal's Deputy of the Northern District of Georgia, during my continuance in the said office, and take only my lawful fees. So help me God.

"F. D. Dismuke, Jr.

"Sworn and subscribed to this 16th day of December in the year 1895 before me.

"Wm. T. Newman, U. S. Judge."

"Petitioner entered upon his duties as deputy marshal on the date above mentioned and served continuously as such deputy marshal on a fee basis until April 30, 1902. Petitioner was a field deputy as distinguished from an office deputy.

"On February 7, 1902, petitioner was duly and regularly appointed as postmaster at Thomasville, Georgia, and continued to hold said office and discharge its duties until April 27, 1914.

[fol. 23] "On September 10, 1921, petitioner was appointed Federal Prohibition Director and continued as an employee of the United States in the Prohibition Service until June 30, 1933.

"On June 30, 1933, petitioner being then an employee of the United States to whom the Civil Service Retirement Act, approved May 29, 1930, applied was involuntarily separated from the service for reasons other than his misconduct, the reasons for said separation from the service being "due to reduction in force."

"On June 27, 1933, petitioner addressed and mailed to the Director of Insurance, Veterans Administration, Washington, D. C. a letter, as follows:

Macon, Georgia, June 27th, 1933.

"Director of Insurance,
Veterans Administration,
Washington, D. C.

"Dear Sir:

"I have been a Government employee for over thirty-one years and a Civil Service employee since March 1st, 1928. I was not in Government service in August, 1920, but did return to the Government service on September 10th, 1921, at a salary of $4,000 per year until September, 1925, when this salary was reduced to $3,900, until March 1st 1928. I am now fifty eight years of age.

"Please advise me the amount of money to be refunded by me under the Retirement Act which will place me in line for the benefits under this Act, and also the amount of compensation I will draw.

"I respectfully request that I be furnished with the latest [fol. 24] order under the Retirement Act for employees who through no fault of theirs are separated from the service; for example, repeal of the Eighteenth Amendment, which will abolish the position I now occupy. Also please furnish information about the President's order concerning retirement of Government employees after thirty years of service.

"Respectfully, F. D. Dismuke, Deputy Prohibition Administrator."

In reply to the foregoing letter petitioner was advised he should deposit with the Treasurer of the United States the sum of $970.09. On October 26, 1933, petitioner forwarded the said sum of $970.09 to the Treasurer of the United States and thereafter received a certificate of deposit as follows:

"(This Deposit Is Not Subject To Check) Cash Room.

"Thomasville, Georgia, Deposit No. 5998.
(Address of depositor and date sent)
(To be filled in by Depositor)

"Frederick D. Dismuke
(Name of depositor)

_____
(Title)

"has deposited with Treasurer U. S. , _____
(Name of depositary) (Place)

"Nine Hundred seventy 09/100 Dollars
"on account of 100
service credit payment to civil service $970.09
retirement and disability fund Claim D 18566.

/926/33

[fol. 25] "This certificate of deposit issued subject to deduction for uncollectible items.

I certify that the above amount has been received and credited in the account of the Treasurer of the U. S.

Depositary will date, sign and return this to Depositor for his retained copy.

Nov. 4 1933
(Date credited)
Signed (illegible)

Acting Assistant Treasurer.
Cashier
2—15050"

Neither the whole of this deposit nor any part thereof has been returned to petitioner.

"Petitioner had come under the provisions of the Civil Service Act on February 29, 1928, and all of the deductions from his pay called for by said Act were duly and regularly made thereafter.

"Petitioner has paid to the Government all of the deductions, refunds and amounts required of him under the Civil Service Act or the Annuity Act in order to make him eligible for the annuity benefits, petitioner having paid approximately $1650.00 to the Government in order to be eligible for such annuity benefits.

"Shortly after June 30, 1933, petitioner filed his claim with the Administrator of the Veterans Affairs for the annuity under the provisions of section 8 (a) of the Act of June 16, 1933, and on or about December 26, 1933, petitioner received a letter from H. L. McCoy, Director of Insurance, as follows:

[fol. 26] "Retirement Subdivision-FBC
R-53416, Frederick D. Dismuke.

"Mr. Frederick D. Dismuke,
Thomasville, Georgia.

"DEAR SIR:

"Referring to your above entitled claim for annuity under the provisions of Section 8 (a), Act of June 16, 1933, you are advised that it is rejected on the ground that you did not render 30 years of allowable service as required by said Act, the service as a Field Deputy U. S. Marshal from December 16, 1895, to April 30, 1902, having been excluded

upon the ground that Field Deputy Marshals are regarded as employees of the Marshal and not of the United States.

"In accordance with existing rules of practice you are allowed one year from the date of this letter within which to enter an appeal from the adverse action taken to the administrator of Veterans Affairs, Veterans Administration, Washington, D. C. Your appeal should be mailed in an envelope addressed to the Director of Insurance, Veterans Administration, Washington, D. C. A copy of the rules of practice in the matter of appeal is enclosed for your information.

"However, instead of making an appeal as above indicated, you are at liberty to furnish material evidence, for the purpose of obtaining further consideration of your claim by the Director of Insurance. Should he deem the additional evidence sufficient to warrant reopening such action will be taken, but if not considered thus sufficient you will be advised accordingly and of your right to appeal in the manner hereinbefore set forth.

"Respectfully, H. L. McCoy, Director of Insurance."

dbp/meh
Enc.

[fol. 27] Shortly after receipt of said letter from the Director of Insurance, and within the time allowed by law and the regulations, petitioner appealed from the decision of said Director to the Administrator of Veterans Affairs and on March 13, 1934, the Board of Veterans Appeals rendered a decision as follows:

"Dismuke, Frederick D. M-123
"R-53,416 Civil Service Retirement Act, May 29, 1930.
Affirmed.

"Appeal has been entered under the authority of Veterans Regulation No. 2 (a), Part 11, from the decision of the Director of Insurance, holding that for civil service retirement purposes this former civil service employee is not entitled to be credited with certain time that he served as field deputy marshal on a fee basis.

The question at issue:

"May the time that this appellant served as a field deputy marshal be used in determining his eligibility to annuity?

"The appellant became separated from the service on June 30, 1933. He filed application for annuity under the provisions of Section 8 (a) of the Independent Offices Appropriation Act, approved June 16, 1933, which provides in substance that Civil Service employees who are involuntarily separated after having had thirty years of accredited service shall be entitled to retirement, the same as though they had reached the retirement age, with the exception that three and one-half per centum shall be deducted from the annuity until the retirement age is reached.

"The appellant's claim was rejected for the reason that he did not have thirty years of service exclusive of employment which he rendered as a field deputy marshal from [fol. 28] December 16, 1895, to February 6, 1902. A more specific ground of rejection was that field deputy marshals are employees of the marshal and not employees of the United States for civil service retirement purposes.

"The claimant has filed a brief, in which he cites reasons and authorities to support his claim that field deputy marshals are employees of the United States.

"The question at issue in this claim is not a new one. In the claim of George Taylor Larkin, decided by the Secretary of the Interior, October 4, 1920, recorded in 21 P. & R. D., 42, it was held that "deputy marshals were employed by the marshal and not by the United States." As authority for this decision the Secretary of the Interior cited Powell v. United States, 60 Fed. Rep., 687, Douglass v. Wallace, 161 U. S., 346, and 3 Comptroller's Dec., 648.

"It has been the consistent practice in the adjudication of retirement claims not to allow credit for service rendered as field deputy marshal on a fee basis. There is a distinction between field deputy marshals and office deputies. The position of office deputy marshal was brought into the classified civil service on May 6, 1896. Also, by executive order on March 2, 1909, deputy marshals, other than those employed as field deputies whose chief duties were to serve process, were brought into the classified service. They remained in the classified service until the Act of October 22, 1913, which act made it optional with the marshal whether deputies should be appointed with regard to the Civil Service Act. However, field dep-ty marshals always have been considered employees of the marshal. They hold office at his pleasure and are paid by fees. As stated

in Powell v. United States, cited supra, the deputy "may have any contract with the marshal for his compensation which they may see fit to make," with the limitation that the deputies shall not receive more than three-fourths of the fees. In that decision it was held specifically that "a [fol. 29] deputy marshal is not an officer of the United States and cannot maintain a suit against it for services rendered."

"Section 8 (a) of the Independent Offices Appropriation Act, June 16, 1933, provides that the thirty years of service required by such section shall be computed as prescribed in Section 5 of the Civil Service Retirement Act of May 29, 1930. It is provided in Section 5 of the Act of May 29, 1930, that the aggregate period of service shall be computed from 'date of original employment, whether as a classified or unclassified employee in the civil service of the United States.' In construing the word 'employee' as used in Section 5, it has been held that it usually means a person employed in regular and continual service for wages or a salary as contradistinguished from one engaged for particular transactions. (22 P. & R. D. 31, citing Louisville, Evansville and St. Louis Railroad Company v. Wilson, 138 U. S., 501.) The service rendered by a field deputy marshal as a process server on a fee basis is not necessarily continual. His service is more in the nature of a contract to perform specific duties on a fee basis when and if necessary. The amount of time involved is not an important factor.

"For the reasons stated, and in conformity with precedents, it is the decision of the Board of Veterans' Appeals that the service rendered by this appellant as a field deputy marshal over the period of time in question may not be used as accredited service in the computation of his right to benefits under the Civil Service Retirement Act of May 29, 1930, and Sec. 8 (a) of the Independent Offices Appropriation Act of June 16, 1933. The decision appealed from is affirmed.

"Approved March 1, 1934,
"Board of Veterans' Appeals."

"The only question at issue in this case is whether the time petitioner served as a field deputy marshal can be used in determining his eligibility to annuity, or to state

[fol. 30] it differently, was petitioner as a field deputy marshal an employee of the United States for civil service retirement purposes.

"Assuming that credit is granted for the service in question, the petitioner is entitled to an annuity under section 8 (a) of the Act of June 16, 1933, in the amount of $1181.16 per annum from July 1, 1933, and $1224.00 per annum from January 21, 1945. And if credit is not granted for the service in question petitioner is entitled under the terms of section 7 of the Act of May 29, 1930, to an annuity at the rate of $555.60 per annum from July 1, 1933.

"Ever since the passage of the Act of May 28, 1896, field deputy marshals have been and are paid by the check of the marshal drawn on the Treasurer of the United States.

"The employment record and the retirement record of petitioner is correctly stated on the record attached hereto and marked "Exhibit A"."

EXHIBIT "A"

[fol. 31]
No. 4457

Dismuke (Surname) Frederick (First Name) D. (Second Name)

Date of Birth: Month 1, Day 21, Year 1875
Legal Voting Residence: State and Cong. District Georgia, County Thomas, City or Town Thomasville
Sex M Race W
Military Service: Yes .... No x
Retirement Age 70
Military Pension on war risk: Compensation Yes ... No

Reference Nature of Action	Position and Grade		Salary Pay Less Basic Allowances Pay	Effective Date	Department or Establishment Official Station	Total Service Mos. Days Yrs.
Appointed	Fee Deputy		Fees	12/16/95	Justice, U. S. Mars. Of., Griffin, Ga.	
Transferred	" "		Fees	10/10/97	Justice, U. S. Nars. Of., Columbus, Ga.	
Resigned	" "		Fees	4/30/02	Justice, U. S. Mars. Of., Columbus, Ga.	
Appointed	Postmaster		$2200	2/ 7/02	P. O. Dept., Thomasville, Ga.	
Promoted	"		2300	7/ 1/02	" " " " "	
Promoted	"		2400	7/ 1/03	" " " " "	
Promoted	"		2500	7/ 1/06	" " " " "	
Promoted	"		2600	7/ 1/10	" " " " "	
Expired	"		2600	4/27/14	" " " " "	
Appointed	Fed. Pro. Dir.		4000	9/10/21	Treas., I. R., Atlanta, Ga.	
Classified	" " "	(CAF-11)	4000	7/ 1/24	" " "	
Transferred	Dep. "	Admr. (CAF-10)	3900	9/ 1/25	" " Savannah, Ga.	
Transferred	" " "	"	3900	4/ 1/27	" Pro., Savannah, Ga.	
Transferred	" " "	"	3900	2/ 1/28	" " Macon, Ga.	
Appt. Prob. CS	" " "	"	3900	3/ 1/28	" " " "	
Welch Act	" " "	(CAF-9)	3700	7/ 1/28	" " " "	
Promoted	" " "	(Class. Pend)	3800	7/ 1/29	" " " "	
Transferred	" " "	"	3800	7/ 1/30	Justice " " "	
Temp. Desig.	Actg. Dep. "	" "	3800	7/ 1/30	" " " "	
Perm. Desig.	Dep. Pro. "	(CAF-9)	3800	10/16/31	" " " "	
Dropped-R	" " "	"	3800	6/30/33	" " " "	

Sec. 8a Act of 6/16/33
Education: (Indicate Number of years)
Common School 1 2 3 4 5 6 7 8
High School 1 2 3 4
College 1 2 3 4
Junior College.....
Degrees, If Any .....

Special Qualifications

* Dual Service, no attempt to verify.

5-10659

[fol. 32]

No. .....

Dismuke	Frederick	D.
(Surname)	(First Name)	(Second Name)

Date of Birth: Month 1, Day 21, Year 1875
Sex M Race W
Retirement Age 70

Date | Designation | Office

Date	Fiscal Year Deductions and Service Credit Contributions	Tontine Deductions	Net Fiscal Year Deductions and Service Credit Contributions	Departments Establishments Will Not Use This Column	Balance Forward	Total Credited to Employee	Date of Original Appointment 12/16/95 Remarks
1928	$45.52						Ded began 3/1/28
1929	131.22						
1930	132.96					$309.70	
1931	132.96	$12.00	$120.96		$309.70	$430.66	
1932	132.96	$12.00	$120.96		$430.66	$551.62	
6/30/33		$12.00	$121.20		$551.62	$672.82	

Aug. 11, 1933 Deducations and service history certified correct D. H. Reichgut Chief

Records verified. Claimant appears entitled
CJB to annuity. Civil Service Commission: By Wm. C. Andrew, Chief, Retirement Section Aug. 16, 1933.

Retirement Record Card—Civil Service Commission Form 2806—Feb. 1931

[fol. 33] Retirement Subdivision 2806

File
Noted

Received by
Jan. 18, 1933

Veterans Administration

E. R. M.
1-22-34

Service Record and
Washington Retirement Division

January 17, 1934

Chief Clerk,
Department of Justice,
Washington, D. C.

SIR:

For the information of your office and for the purpose of completing your record, you are advised that claim No. R 53416, under section 8 (a) of the act of June 16, 1933, of Frederick D. Dismuke, Thomasville, Georgia, a former employee of the Bureau of Prohibition, (Deputy Prohibition Administrator) has been rejected on the ground that claimant did not render thirty years' allowable service as required by said Act, the service as a Field Deputy, U. S. Marshal fr. from December 16, 1895, to April 30, 1902, having been excluded upon the ground that Field Deputy Marshals are regarded as employees of the Marshal and not of the United States.

Respectfully, H. L. McCoy, Director of Insurance.

3-2116.

The following evidence was introduced on behalf of the plaintiff:

The following excerpts from Instructions to United [fol. 34] States Marshals, Attorneys, Clerks and Commissioners, dated July 1, 1895:

"Department of Justice, Washington, D. C., July 1, 1895.

To United States Marshals, Attorneys, Clerks and Commissioners:

The following instructions are issued for your guidance in performing the duties of your office and rendering your accounts to the Government.

A careful observance of these requirements will obviate the necessity for much of the correspondence which is now found necessary relative to your duties and the rendition of your accounts.

Respectfully, Judson Harmon, Attorney-General."

Page 6:

"Marshals are the disbursing officers of the courts. Congress annually appropriates money for the maintenance of the United States Courts under the following heads, viz: Fees of jurors, fees of witnesses; support of prisoners; pay of bailiffs, etc., and miscellaneous expenses. Advances are made to marshals upon their requisitions sent to the Attorney-General, under each of the appropriations. Funds so advanced must be kept separate and not used except to defray expenses incurred under the appropriation from which advanced. Limited advances are also made on account of fees and expenses of Marshals."

Page 8:

"In accordance with the provisions of the above sections, any public money advanced to disbursing officers of the [fol. 35] United States must be deposited immediately to their respective credits, with either the United States Treasurer, some assistant treasurer, or designated depositary, other than a national bank depositary, nearest or most convenient, or, by special direction of the Secretary of the Treasury, with a national bank depositary, except ——".

"Any check drawn by a disbursing officer upon moneys thus deposited must be in favor of the party, by name, to whom the payment is to be made, and payable to "order" or "bearer," with these exceptions."

"Checks will not be returned to the drawer after their payment, but the depositary with whom the account is kept shall furnish the officer with a monthly statement of his deposit account."

Page 9:

"Collections

"Collectors and surveyors of customs, collectors of internal revenue, and receivers of public moneys, living in the same city or town with an assistant treasurer, or designated

depositary, must deposit their receipts at the close of each day. Officers at such a distance from a depositary that daily deposits are impracticable, must forward their receipts as often as they amount to $1,000, and at the end of each month without regard to the amount then accumulated."

"All collections must be deposited to the credit of the Treasurer of the United States, except moneys received by collectors of internal revenue from sales under Section 3460, Revised Statutes of the United States, or from offers of compromises when received prior to the acceptance of the offer, which must be deposited to the credit of the Secretary of the Treasury as heretofore."

[fol. 36] "District attorneys, marshals and clerks of courts who receive public moneys accruing to the United States from fines, penalties, and forfeitures, fees, costs (including costs in criminal suits for violations of the postal laws), forfeitures of recognizances, debts due the United States, interest on such debts, sales of public property, or from any other sources, will deposit the same in accordance with the foregoing paragraphs, except moneys accruing from customs (including navigation) and internal-revenue cases, which should be paid to the collector or surveyor of customs or collector of internal revenue of the district in which the case arose, and moneys accruing from civil postoffice suits, and fines in criminal cases for violation of the postal laws, which should be deposited to the Treasurer's credit for the use of the Post-Office Department."

Page 10:

"All moneys advanced from the Treasury to any officer or agent of the Government for disbursement, or coming into his hands, must be deposited to his official credit as such disbursing officer or agent, and drawn upon only in his official capacity."

Page 14:

"A marshal may appoint necessary deputies. He should employ only such a number as he has work for in serving process issued in well founded cases, rather than a large number for whom he has not sufficient work, but who are tempted to instigate prosecutions on frivolous or ground-

less charges for the sake of the fees to be earned. This, in the past, has been a great source of evil and must be remedied."

"Immediately upon receipt of these instructions, each Marshal will report to the Attorney-General the name and [fol. 37] address of each of his deputies, with the terms of the contract under which he serves. Hereafter when a deputy is appointed the Attorney-General must be notified, giving the name, location of the deputy, and the terms of the contract with him, and when any deputy is discharged, the Marshal should notify the department."

"The proportion of fees and emoluments which the deputy is to receive must be fixed definitely in advance. The practice that has obtained in some districts of making contracts with deputies on a sliding scale, so that the compensation of the deputy depends upon the total earnings of the marshal's office, rather than the service performed by him, thus managing to dispose of a surplus that would otherwise exist, is not warranted by law."

"The acts of a deputy are the acts of a marshal, who will be held strictly responsible for them. The marshal should carefully scrutinize the accounts of his deputies to see that all charges are legal, and that all services charged for have been performed as stated."

Pag- 28:

"The marshal and each deputy should make out a voucher for all services for which the United States is liable, payable from this appropriation, performed by such marshal or deputy during the quarter. The voucher of the Marshal for personal services should be No. 1, and should contain all charges for services of the marshal, except commissions on disbursements, which should not be included in the voucher, as they are charged separately in the account current."

"Each sheet must show the title of the case, the name of the officer making the service, the offense charged, the date of the issuance of the writ, by whom issued; if a warrant, by whom complaint was made, and his official title, if he have any, place and date of receiving the writ, when [fol. 38] and from what place travel to serve was made, date of service, place of service showing the county and distance and direction from the post office nearest the

place of service, and where return was made. Each page must contain fees earned in one case only. Only one side or page of each sheet must be used, the pages numbered, the date when each item of service was performed given on the left hand margin of the page (do not "ditto"), each item of service definitely stated, the items of charge on each page footed and the footing carried to the next page or into an abstract for that voucher. The pages of the voucher should follow consecutively that is, in the order of time as the several cases were disposed of. All the charges for services of a deputy during a quarter should be included in one voucher and where he renders service in a case in which he did not make the arrest, reference should be made to the voucher and page where the charge for arrest appears and to all vouchers which contain any charges in the same case. The several pages of a voucher should be neatly fastened together with the affidavit of the officer, and the footing of the voucher carried to the general abstract of the account."

"The following is a form for charging fees earned in serving a warrant, which is approved by the Attorney-General and the accounting officers of the Treasury:

Page 29 (Form):

"The United of America to ....., U. S. Marshal, Dr. for services by Deputy ....., in case of the United States vs. ..... Residence, ..., Offense charged, ..., Warrant issued, ..., 189.., by ..... U. S. commissioner at ..... Complaint made by ..... Warrant received by Deputy ....., at ....., 189.. Warrant executed ....., 189...., in ..... county, ... miles from ..... P. O. Warrant returned with the defendant, ... 189...., before U. S. Com-
[fol. 39] missioner ....., at .....

Dates : In the above case fees were earned and Dolls. 189——: Cts. expenses incurred, as follows:

---

1. Travel, in going only, to serve warrant, from ..... (travel actual and necessary) .... miles at 6 cents per mile.

2. Expenses incurred while endeavoring to arrest:
..... Dolls. ..... Cts.

.....

.....

Total .....

Maximum allowed by law for ..... days.

3. Serving warrant (defendant taken into custody).

4. Mileage, transporting self and prisoner ..... miles, and ..... guard ..... miles, 10 cents per mile each.

5. Actual expenses feeding prisoners, as follows:
..... Dolls. ..... Cts.
Total charged to account ——.

6. Committing defendant to jail temporarily .....

7. Transporting prisoner to jail at ..... miles at 10 cents per mile for deputy, prisoner, and ..... guards.

8. Committing Defendant .....

9. Discharging defendant on bond .....

[fol. 40] 10. Discharging defendant .....

11. Attendance of Deputy ..... before Commissioner ..... days .....

12. Serving ..... subpœnas for plaintiff's witnesses.

Memo. of subpœna service.

Issued Received Travel Place of Service Served on

.....

.....

.....

Amount carried to abstract .....

Remarks ..... Voucher No. ..... page ....."

Page 35: (Affidavit of Deputy to Voucher).

"The deputy must swear to his voucher. The affidavit should be in the following form:

..... District of .....
....., deputy United States marshal for said district, being duly sworn, deposes and says that the above account for ..... dollars and ..... cents for

services performed and expenses incurred by him from ..... to ....., 189...., is true and correct; that the services therein charged for were actually and necessarily rendered; that the expenses charged were actually and necessarily incurr-d and paid by him in lawful mon-y; that in each case where an arrest was made the defendant was taken before the nearest circuit court commissioner, or the nearest judicial officer having jurisdiction under existing laws, and that all mileage charged is [fol. 41] for travel made with cost to the marshal or deputy.

..... Deputy Marshal.

Sworn to and subscribed before me this the .. day of ...., 189.....

.....

Clerk.

"This affidavit must be executed before an officer having general authority to administer oaths, and must be on or attached to the last page of the voucher. It is not necessary to swear to each page of the voucher, but one oath as to all the services and charges of the deputy during a quarter is sufficient. If any fees for making arrests or for travel are made by the marshal, he also must make affidavit as to the defendants having been taken before the nearest commissioner or judicial officer, and that the travel was not without cost."

Page 39:

"The total amount paid deputies as shown by Abstract A should be carried into the credit side of the emolument return under the head, "Paid deputies for their services and expenses as per accompanying Abstract A".

Deputies must receipt for the amount paid them as fees and expenses, which receipts should be numbered in the order their names appear in the abstract. Receipts may be in the following form:

Received of ....., United States marshal for the ..... district of ....., dollars and ..... cents in full for my services and expenses as a deputy marshal, for the period from ..... to ..... 189.....

.....

Deputy.

[fol. 42] No credit can be allowed a marshal for a payment to a deputy who has not been regularly appointed and taken the oath of office prescribed by section 782, Revised Statutes.

No more than 75 per cent of the net earnings of a deputy can be paid, and the proportion of fees and emoluments which the deputy is to receive must be fixed definitely in advance. This proportion, whether one-half, two-thirds, etc. of the net earnings, must be shown in Abstract A.

The Attorney General has prescribed a limit of $3,000 to be paid any deputy as his share of net earnings during any calendar year, or that rate for any part of a year. If a deputy's net earnings during the first half of a year are $2,500, and he should not actively engage in the performance of duties during the entire second half of the year, he should only be paid an amount in proportion to the time actively employed at the rate of $3,000 per annum or the rate fixed for h-s compensation."

The following excerpts from Instructions to United States Marshals, Attorneys, Clerks and Commissioners, dated January 1, 1899:

"In the performance of your duties and the rendering of your accounts, you will observe the rules and regulations, and will be guided by the instructions set forth herein.

These instructions will take effect January 1, 1899, and supersede instructions to United States Marshals, Attorneys, Clerks and Commissioners, dated July 1, 1895, Instructions to United States Marshals and Attorneys, dated July 1, 1896, and Instructions to United States Commissioners, dated June 1, 1897.

The act of Congress of May 28, 1896, and the practice [fol. 43] and forms consequent upon the enactment thereof, make imperative a full comprehension of these instructions, and you are directed to comply strictly with them.

Respectfully

John W. Griggs, Attorney General."

Pages 25, 26, 27, 28:

"Before entering upon the duties of his office each field deputy must take the oath of office prescribed by Department Form 10.

"Immediately upon the appointment of a field deputy, under Section 11 of the above act, the marshal must make the required report to the Attorney General, forwarding therewith the oath of the appointee.

"The marshal in his report to the Attorney General of an appointment or appointments under section 11 of this act, must state the "facts as distinguished from conclusions" i. e., he must show specifically how the public interest will be promoted thereby.

"Each such report must also state:

1. The name and age of the proposed employee.

2. His present residence and occupation.

3. Where it is proposed to fix the place of his official headquarters.

4. The territory which will be covered by him in the service of process.

"Marshals should exercise great care in the selection and employment of field deputies.

"Field deputies must be located at various places [fol. 44] throughout the district, with a view to economy and efficiency in the conduct of the public business.

"Appointment of field deputy marshals other than as the public interest may require will be canceled.

"Before entering upon his official duties each field deputy must take an oath of office in the manner and form as prescribed for office deputies.

"The requirements as to the execution of a new oath by a field deputy, upon his retention in office by the successor of the marshal who appointed him, or whenever the marshal is required to take a new oath, are the same as in the case of an office deputy (p. —, par. —, supra).

"Whenever a field deputy is employed or suspended or dismissed from the service, or whenever a change is made in his official headquarters, the marshal will at once communicate the facts to the Department in writing. There should be no delay in so notifying the Department.

"When an office deputy or a field deputy is removed or dismissed because of official misconduct he must not again be employed in any capacity wherein his compensation is to be paid by the United States, unless specific authority has first been obtained from the Attorney General.

"The accounts of field deputies for fees earned and expenses incurred in accordance with law are payable from the appropriation "Salaries, fees and expenses of marshals, United States Courts."

"The marshal will furnish to each of his deputies a sufficient supply of Form 32, and will require them to make reports upon such forms to the main office as soon as any service upon which the deputy is engaged has been completed.

"The marshal will use these reports in making the [fol. 45] proper entries on the dockets and also in preparing the original and duplicate copies of his accounts.

"All charges for services of a deputy during a quarter payable from this appropriation, whether earned in cases to which the United States is a party or not, must be included in one voucher.

"Each sheet must show:

1. The name of the deputy.
2. The title of the case.
3. The offense charged (section of statute).
4. The nature of the writ (whether warrant, capias, etc.).
5. The date and place of issuance of the writ.
6. By whom issued.
7. If a warrant, by whom complaint was made and his official title, if he have one.
8. Place and date of receipt of writ by deputy.
9. Date of service.
10. Place of service, showing the county, and distance and direction from nearest post-office to place of service.
11. Date return was made.
12. Before what officer.
13. From what place travel to serve was made.
14. If a civil writ, the nature of the cause of action must be shown. State in case of subpoena place issued, place received and where served. In a case wherein the United States is a party it should be shown whether each item of service is on behalf of the United States or the other party.
15. How case was disposed of.

"Each page must contain fees earned in one case only. Only one side or page of each sheet must be used, the pages numbered, the date when each item of service was per-

formed given on the left-hand margin of the page (do not "ditto"), each item of service definitely stated, and the items of charge on each page footed.

"Charges for subpoena service should be indicated on [fol. 46] the bottom of the page upon which the warrant in the case is charged.

"The several pages of a voucher and the affidavit of the officer should be neatly fastened together, and the footing of each page carried to the abstract of the voucher.

"The pages of the voucher should be arranged chronologically, beginning with the case in which the first writ was served.

"Where a deputy renders service in a case in which he did not make the arrest, reference should be made to the voucher and page where the charge for arrest appears.

"When these accounts are presented to the marshal he should satisfy himself of their correctness and pay the amount due, namely, the expenses allowed by section 11 of the act of May 28, 1896, and subsistence of prisoners before commitment, and three-fourths of the gross fees earned, not to exceed the rate of $1,500 per fiscal year for any part of a fiscal year, except where in special cases the maximum co-pensation which a deputy may earn has been increased in accordance with said section, when payment may be at such increased rate. But in no case shall a marshal pay a deputy more than three-fourths of the gross fees earned by him.

"A field deputy marshal who is entitled to compensation from fees not exceeding $1,500 per annum can be paid only at that rate for a period less than a year, but the surplus earnings of one quarter may be paid to make up a deficiency in any other quarter of the same fiscal year. (III Comp. Dec. 226):

"The marshal should enter on each page of the voucher his docket number of the case.

[fol. 47] "The amount expressed in the receipt of the deputy must be paid him in full, in lawful money, by the marshal. The payment should be made by check. The examiners of this department will report promptly to the Department the facts as to any Marshal who has not paid his deputies the full amounts designated in their receipts attached to the marshal's accounts.

"After payment the voucher should form part of the marshal's regular account under the appropriation "Salaries, fees and expenses."

"Field deputies must furnish receipts in the manner and form and for the expenses indicated below:

"Receipts for subsistence must be furnished.

"Receipts for single meals are required.

"Receipts for team hire must be furnished."

"Each receipt must state, specifically, the item of expense; also whether the expense incurred was for the deputy marshal or for a prisoner.

"All receipts must be written and signed in ink or indelible pencil.

"The field deputy of a marshal is entitled under section 11 of the act of May 28, 1896, to three-fourths of the fees formerly allowed to a marshal under section 829, Revised Statutes, and he is also entitled, as were marshals, to charge railroad fare as a part of his expenses, within the limits of $2 per day, in endeavoring to arrest. (III Comp. Dec. 51.)

"When the fees of a field deputy marshal for services rendered during a fiscal year amount to $1,500 before the end of the year, he must continue to serve during the [fol. 48] whole year in order to receive the maximum compensation of $1,500 per annum fixed by law, his expenses while so serving being covered by actual expenses allowed in lieu of mileage when process is served, or actual expenses, not exceeding $2 per day, on an unsuccessful endeavor to arrest. (III Comp. Dec. 575.)

"The compensation of a field deputy marshal for all his services, in cases between individuals as well as in cases to which the United States are a party, is paid by the United States, and is governed entirely by the statutes fixing the fees of such officers without relation to the fees which may actually be paid by a private litigant for the services rendered by the deputy and which are covered into the Treasury.

"A field deputy marshal is not entitled to a fee for any services rendered on behalf of a party to a suit unless there is a fee specifically provided by law for that particular service. (III Comp. Dec. 733).

"A marshal is not authorized to reimburse a field deputy for expenses incurred in caring for and preserving property seized under a writ of replevin, there being no pro-

vision of law for the payment of such expenses. (Comp. to Cooper, E. Ark., May 26, 1898.)

"The account of a field deputy marshal for fees earned and expenses incurred in the service of a warrant should be rendered on Form 26.

"The total expenses incurred in endeavoring to arrest should be given, but only $2 of the expense for each day should be charged in the account.

Page 29:

[fol. 49] "No expense can be allowed as an expense endeavoring to arrest incurred after the arrest has been made. The maximum allowance for any one day in double fee districts is $2 the same as in single fee districts. Expenses endeavoring to arrest can be allowed even though the arrest is not made, but in such cases it must be shown just what was done by the officer on each day.

"When prisoners are placed in jail, no fees or charges of the jailer should be paid from the appropriation "Salaries, fees and expenses." Such charges are properly payable from the appropriation for support of prisoners, United States courts, upon vouchers rendered by the jailer in the usual manner.

"Expenses incurred by a marshal and his deputy in providing for a prisoner in his custody, except while placed in jail, until the prisoner has been formally committed, should be paid from the appropriation "Salaries, fees and expenses of marshals" after the prisoner has been committed, and while temporarily placed in jail, the appropriation for support of prisoners is applicable to expenses for his support. (IV Comp. Dec., 525.)

"Prisoners in the custody of an officer must be subsisted in the most economical manner. Extravagant charges will not be allowed.

"Whenever a deputy marshal renders an account for services in a case and charges are made in the same case in another place, either in his own voucher or that of another deputy, reference must be made to the voucher and page where such other charges appear.

"A field deputy marshal is entitled to charge a per diem fee of $2 for his attendance before commissioners upon examination of prisoners charged with crime. When he [fol. 50] attends in more than one case in a day before the

same commissioner he is entitled to but one fee for attendance.

"Per diems of more than two deputies for attendance in the same case on the same day will not be allowed. Usually not more than one officer is necessary, and when more are in attendance the necessity must be shown. If the hearing is held at the place of the marshal's or an office deputy's official residence and the attendance of more than one deputy is necessary, the marshal or one of the office deputies should attend. An explanation will be required from a marshal or office deputy of his failure to so attend."

Page 32:

"In like manner an incoming marshal, making payments on account of services and expenses of his predecessor's deputies, will make reference to the record of service filed with the outgoing marshal's accounts, and transmit with his account current simply receipts for the actual payments so made to said deputies."

Page 33:

"But a field deputy may elect to receive actual expenses in lieu of mileage. In such event the compensation of the field deputy would be the same is in case 1-a, p. 32. But as the mileage exceeds the expenses, the fact that the field deputy elected to take actual expenses would not affect the amount to be collected from the litigants and paid to the clerk."

"In those districts in which the payment of double fees to marshals has been authorized by general laws of permanent application, to wit: Oregon, Nevada, New Mexico, Arizona, Idaho, Wyoming and North Dakota, the marshals shall continue to collect double fees from litigants in suits between individuals and corporations; but there shall be [fol. 51] paid to field deputy marshals in said districts three-fourths only of single fees."

Page 34:

"Marshals and deputy marshals in the districts of Oregon, Nevada, New Mexico, Arizona, Idaho, Wyoming and North Dakota when rendering their accounts and reports of fees earned on Forms 270, 25, 26, 34, 55, 68, 194; 195 etc.;

and when making payments to clerks of courts of fees and costs collected, and reporting the same upon amended Form 72, will report and pay over double fees."

"As by the Act of May 28, 1896, a field deputy marshal receives from the United States his compensation for all services, he is required to furnish in support of his accounts the same receipts and vouchers for expenses incurred in cases in which the United States are not a party as are required by established practice in cases in which they are a party. (III Camp. Dec. 156.)."

"The question of the fees to be allowed to a field deputy marshal for the service of process does not involve the question of the fees to be charged private litigants, the latter being for the determination of the court upon the taxation of the costs (III Comp. Dec., 239)."

Page 38:

"The amount of fees which a field deputy is to receive is prescribed by the clause in section 11 of the act of May 28, 1896, and is the same in all cases whether the United States are a party or not. This compensation does not depend upon the amount which may be taxed either against the defendant in a criminal case, or the unsuccessful party in civil proceedings, which is governed by the provisions of section 6, and is to be collected and paid to the clerk of the court. It is clear, therefore, that a field deputy marshal is not entitled to receive more than one mileage for travel on any one trip."

[fol. 52] "What amount should be charged private parties in such cases is a question for the determination of the court upon the taxation of costs. (III Comp. Dec. 239)."

Page 50:

"Any disbursing officer or agent drawing checks on moneys deposited to his official credit must state on the face or back of each check the object or purpose to which the avails are to be applied."

"Checks will not be returned to the drawer after their payment, but the depositary with whom the account is kept will furnish the officer with a monthly statement of his deposit account."

Page 51:

"If a marshal desires the privilege of depositing public moneys in a national bank depository he should make application to the Secretary of the Treasury to be specially authorized to do so, stating the facts upon which he bases his request, forwarding his application to this Department for transmission to the Secretary of the Treasury."

Page 52:

"A marshal will not ask for the return of checks drawn by him in his official capacity. If the depositary should return such checks, the marshal is directed to transmit the same again to the depositary, with the request that he be furnished with a statement of his deposit account in lieu thereof.

"Marshals are directed to make all payments by official check, except when specially authorized by the Secretary of the treasury to hold money at their own risk."

"Each juror, deputy marshal, or other public creditor [fol.53] whom it is the duty of the marshal, as disbursing officer, to pay, must be paid by check as above."

Page 63:

"All money advanced by the United States is for the payment of its creditors, and whoever uses public funds for private purposes, even temporarily; is guilty of embezzlement. (See secs. 3620 and 5488, Rev. Stat.) The object of permitting marshals to hold money otherwise than in a public depository is to facilitate the payment of public creditors where it is impracticable to make all payments by check, and the authority from the Secretary of the Treasury to keep on hand a certain amount of money does not convey the right to use that money in any other way than for the payment of the legitimate expenses of the Government."

The Government objected to the introduction of the foregoing excerpts from the books of regulations upon the grounds that they were irrelevant and immaterial; the objection was overruled and an exception was noted and allowed.

GEORGE F. WHITE, sworn for the Plaintiff, testified:

I am the Clerk of the United States Court for the Middle District of Georgia, and my first position with the Government was that of Deputy United States Marshal of the Southern District of Georgia with headquarters at Macon, having been appointed on September 29, 1889, holding this position for practically thirteen years, and was on a fee basis some of that time, living in Macon devoting all of my time to the duties of the office. I was to a certain extent familiar with conditions prevailing in the Northern District with reference to the duties performed there by deputy marshals and knew some of the deputies working in that District. It was customary for the deputies to devote their [fol. 54] full time to the duties of the office in both the Southern and Northern Districts. I knew Mr. F. D. Dismuke in those days and remember that he became a Deputy Marshal during Cleveland's administration between 1892 and 1896. He was working out of Atlanta and was in Columbus for a while; and so far as I know, he devoted all of his time to the duties of the office.

I am in a general way familiar with the duties of deputy marshals at present. They were put on a salary basis in 1904 or 1905. There is no material difference in the duties performed and the work done now by a deputy marshal than before they were put on a salary basis. When I went on in 1889 we were getting sixty per cent of the gross fees, and the marshal was getting forty per cent, and were paid by checks drawn on the Merchants National Bank. In 1896 the marshal was placed on a salary, and the deputy marshals then became known as field deputy marshals, and their fees were fixed at seventy-five per cent of the gross earnings. In 1903 I was made United States Marshal, and after consultation with the Attorney General, the deputy marshals were put on salaries in the Southern District. In arriving at what salary they should draw, we added up the gross fees of all the deputy marshals in the Southern District of Georgia and arrived at what their salaries should be on that basis. Up to 1896 we were making $1500.00 a year, but by the consent of the Attorney General, we could get $2500.00. The Attorney General then took mine off, and I went to $3750.00. In 1896 my recollection is they did away with the Merchants National Bank of Savannah, and all of the checks were drawn on the Treasury Dep-tment.

The marshal collected the costs and deposited it to the credit of the Treasury of the United States and gave the deputy marshals official checks on the Merchants National Bank at Savannah. There was no difference in the work which a deputy marshal did after he went on a salary basis except that he could not act as a bailiff, and could not get [fol. 55] additional compensation for his work; and if he went off with the marshal with the prisoners, he simply got his actual expenses, and did not get any guard fee; but the duties he performed were exactly the same. The marshal made the same requisitions for advancements that he makes now; they would grant him an advance up to the amount of his bond; his bond was $2500.00. He would make a requisition for advances, and there would be so much for fees of marshals, so much for bailiffs, so much for jurors, so much for witnesses, so much for miscellaneous expenses. They would grant him advances up to the amount of his bond in that depositary—the first we knew about it they sent us a copy of deposit slip with the Merchants National Bank of Savannah. Now they send you a slip from Washington showing that it has been deposited in the Treasury —the only difference between then and now. The law provides the amount of compensation for a marshal or deputy for each particular service such as making an arrest, serving a process, etc. The voucher which the deputy marshal made out showing the fees he had earned called for the amounts so fixed by law; and the deputy marshal, in his account against the United States, was paid these fees whether or not the Court taxed the costs against the defendant when he was convicted and whether or not these fees and costs were ever collected from the parties litigant or the defendant in the criminal case against whom they were taxed.

Cross-examination:

We made up a list, I will tell you how it was done. The marshal selected so many deputies at Macon a new marshal coming in, say the Republicans got out and the Democrats come in, because I had to work with two or three of them. We had to write the Attorney General whom we were going to appoint and why we were going to appoint them. We had to give a sort of life history of a man and why it was necessary to have that many deputies at such and such a

place; and when we had made the appointment, it had to [fol. 56] be confirmed by the Attorney General, and we sent him a copy of the oath of office. I don't know whether the marshals made the trades with the deputies or not, for that is something that happened prior to 1889. We was fixed by the Attorney General at sixty per cent. We were employed then just exactly like they are now; the marshal selected his deputies and let them take the oath of office, sending a copy of the oath and his reasons for appointing them, together with their qualifications and the necessity for their appointment, to the Attorney General. If he approved it, they stayed on; if he didn't, they went off. Prior to 1896 the marshal paid them with a check drawn on the Merchants National Bank, marked down at the corner "Fees and expenses of marshal", the check being signed by the marshal and drawn on his public account, drawn just the same as they are now except they are now drawn on the Treasury. They were paid out of the money advanced by the Government to the marshal for fees and expenses of the marshal, just like witnesses were paid, for fees and expenses of witnesses. Prior to 1896 if a marshal got dissatisfied with one of his field deputies, he could fire him without asking the Attorney General just like he can now. During the time I was marshal there was no deduction made from my salary for the Civil Service Retirement Act.

F. D. DISMUKE, the plaintiff, sworn, testified:

I was first appointed as a Deputy Marshal in the Northern District of Georgia and devoted all my time to the duties of the office. I had no other income or occupation. I served for a certain period as a Deputy Marshal in the Southern District, also devoting all my time to the duties of the office, having no other income or employment. It was customary in both Districts during the times of my service as a field deputy marshal for such deputies to devote all of their time to the duties of the office.

[fol. 57] Cross-examination:

I was what was known as a field Deputy Marshal.

Upon the conclusion of the evidence, Mr. Bootle, of counsel for the plaintiff, made the following motion:

PLAINTIFF'S MOTION FOR JUDGMENT

"For a finding in favor of the plaintiff on the pleadings, stipulations of facts and evidence, and we base our motion upon the grounds that the evidence, pleadings and stipulations of facts demand a finding and judgment in favor of the plaintiff."

Mr. Rawls, in behalf of the defendant, moved:

DEFENDANT'S MOTION FOR JUDGMENT

"For a judgment in favor of the defendant upon the grounds that the pleadings, the stipulations and the undisputed evidence show that the plaintiff is not entitled to the relief sought."

This motion in behalf of the defendant was by the Court overruled, and judgment was thereupon entered in favor of the plaintiff for the full amount claimed. Exceptions to said judgment were noted and allowed.

The United States then and there excepted to the rendition of the judgment in favor of the plaintiff, and here and now excepts, and assigns error upon the grounds set out in the assignment of errors heretofore filed in said case.

T. Hoyt Davis, United States Attorney, H. G. Rawls, Assistant United States Attorney, Attorneys for Appellant.

[fol. 58] Acknowledgment of Service

Due and legal service of the foregoing bill of exceptions acknowledged. Copy received, and all other and further service waived; and lodgment in the Clerk's office and notice of application to the Court for approval is hereby waived.

Jan. 17, 1935.

Carlisle & Bootle, Attorneys for Appellee.

IN UNITED STATES DISTRICT COURT

ORDER APPROVING BILL OF EXCEPTIONS

The foregoing bill of exceptions in the above stated case is approved as correct, and is certified to be all of the evi-

dence material to this appeal and to contain all of the rulings of the Court necessary to a clear understanding of the errors complained of.

This the 17th day of January, 1935.

Bascom S. Deaver, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR RECORD—Filed Jan. 17, 1935

To the Honorable George F. White, Clerk of the District Court of the United States for the Middle District of Georgia:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to an appeal entered [fol. 59] in the above entitled cause, and to include in such transcript of record the following parts thereof, to-wit:

1. The petition of the plaintiff, Frederick D. Dismuke;

2. All amendments to plaintiff's petition;

3. The answer of the defendant, together with any and all amendments that may have been filed thereto;

4. The demurrer of the defendant, together with the order overruling the same;

5. The judgment of the Court in favor of the plaintiff;

6. The petition for appeal and assignment of errors, together with acknowledgment of service thereon;

7. Citation with acknowledgment of service thereon;

8. Bill of exceptions approved by the Court;

9. This præcipe with acknowledgment thereon; said transcript of record to be prepared as required by law and the rules of the United States Court of Appeals for the Fifth Circuit.

T. Hoyt Davis, United States Attorney. H. G. Rawls, Assistant United States Attorney, Attorneys for Appellant.

[File endorsement omitted.]

[fols. 60 & 61] Acknowledgment of Service

Due and legal service of the foregoing præcipe acknowledged. Copy received and all other and further service waived.

This the 17th day of January, 1935.

Carlisle & Bootle, Attorneys for Appellee.

Clerk's certificate to foregoing transcript omitted in printing.

Recital as to Citation

Citation omitted from the printed record the original thereof being on file -n the office of the Clerk of the U. S. Circuit Court of Appeals.

[fol. 62] In United States District Court

[Title omitted]

Motion for Order Permitting Defending of Appeal Without Prepayment of Costs

Comes now the plaintiff in the above stated case and says that he prosecuted said case successfully in this court, obtaining a judgment in his favor, and that the United States of America has appealed said case to the United States Circuit Court of Appeals for the Fifth Circuit, all of which appears from the records of said case on file in the Clerk's Office of this Court.

Petitioner now moves the court to pass an order allowing the petitioner to defend to conclusion said appeal in the United States Circuit Court of Appeals for the Fifth Circuit, including all appellate proceedings, without being required to prepay fees or costs and without being required to print his briefs to be used in the appellate court and without being required to give security therefor. Petitioner bases this motion upon the statement under oath, in writing, attached hereto as Exhibit "A", which is to be filed with this motion in the Office of the Clerk of this Court.

(Signed) Carlisle & Boothe, Attorneys for Petitioner.

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF F. D. DISMUKE

GEORGIA,
Thomas County:

In person appeared before the undersigned attesting officer, Frederick D. Dismuke, who being duly sworn, deposes and says:

Deponent is a citizen of the United States and is the plaintiff in the above stated case, which he was entitled to commence in this Court and in which he asked for and obtained a judgment against the United States of America for certain annuity benefits under the laws of Congress which provide for the retirement of civil service employees, enacted May 22, 1930, and under the various amendments to said legislation, including the provisions of Section 8-A of the Act of June 16, 1933. From said judgment the United States of America has prosecuted an appeal to the United States Circuit Court of Appeals for the Fifth Circuit.

Deponent desires to defend to conclusion said appeal but, because of his poverty, he is unable to pay the cost of said appeal or to give security for the same and is unable to pay the cost of printing his brief to be filed to the Circuit Court of Appeals or to give security for the same.

Deponent believes he is entitled to the redress he seeks [fol. 64] in said appeal; namely, the affirmance of the judgment which he obtained in the trial court.

Deponent makes this affidavit to be used as the basis of a motion for an order allowing him to defend said appeal without being required to prepay fees or costs or to give security therefor and allowing him to defend said appeal without being required to print the briefs which he proposes to file in said Circuit Court of Appeals.

(Signed) Frederick D. Dismuke.

Sworn to and subscribed before me this 21 day of February, 1935.

(Signed) T. T. Caldwell, Notary Public, Thomas County, Georgia. State of Georgia, at Large. (Seal.)

Commission expires Dec. 4, 1937.

[fol. 65] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO PROCEED WITHOUT PREPAYMENT OF COSTS

Frederick D. Dismuke, the plaintiff in the above stated case, having filed in this court a statement under oath, in writing, that he is a citizen of the United States and that because of his poverty he is unable to pay the costs of defending the appeal which has been perfected in the above stated case, which case he was entitled to commence and did commence in the court below and, that because of his poverty, he is unable to give security for said costs and that he believes that he is entitled to the redress that he seeks in defending said appeal, in which statement he sets forth briefly the nature of said cause of action and appeal.

And the said Frederick D. Dismuke having fully complied with all of the provisions of the statute in such cases provided.

It is ordered that said Frederick D. Dismuke be and he is hereby allowed to defend to conclusion said appeal in the United States Circuit Court of Appeals for the Fifth Circuit, including all appellate proceedings, without being required to prepay fees or costs and without being required to give security therefor and without being required to print his briefs to be filed in the appellate court.

[fol. 66] In open court this 23 day of February, 1935.

(Signed) Bascom S. Deaver, U. S. Judge. (Signed) Carlisle & Bootle, Attorneys for Petitioner.

[fol. 67] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 68] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 7675

UNITED STATES OF AMERICA

versus

FREDERICK D. DISMUKE

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—April 9, 1935

On this day this cause was called, and, after argument by William S. Ward, Esq., Attorney, Department of Justice, for appellant, and W. A. Bootle, Esq., for appellee, was submitted to the Court.

[fol. 69] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7675

UNITED STATES OF AMERICA, Appellant,

versus

FREDERICK D. DISMUKE, Appellee

Appeal from the District Court of the United States for the Middle District of Georgia

(April 19, 1935)

Before Bryan, Foster and Hutcheson, Circuit Judges

OPINION OF THE COURT—Filed April 19, 1935

HUTCHESON, Circuit Judge:

The suit was brought under the Tucker Act, to recover amounts claimed to be due plaintiff for accrued monthly installments on a Civil Service annuity under C. 101, Sec. 8a, Act of June 16, 1933, 48 Stat. 305, U. S. C. A. Title 5,

Section 692d, and for a declaratory judgment as to future installments.[1]

[fol. 70] The complaint was that though plaintiff had made his application as required, and had complied with all the other requirements of the statutes, his claim had been wrongfully and arbitrarily rejected on the ground that he did not render thirty years of allowable service, because his service as field deputy marshal from December 16, 1895 to April 30, 1902, could not count as allowable service as "field deputy marshals are regarded as employees of the marshal and not of the United States." The United States, insisting that the determination of any right or claim plaintiff may have has been exclusively remitted to administrative discretion and action, and that no consent to sue in respect of it has been given, objected to the jurisdiction of the court. It insisted too, that if there was jurisdiction to consider the claim it ought to be rejected, because the administrative adjudica-

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[1] Sec. 692d Involuntary Separation. "(a) Whenever at any time hereafter prior to July 1, 1935, any employe of the United States or the District of Columbia to whom this chapter applies, who has an aggregate period of service of at least thirty years computed as prescribed in section 695a of this chapter is involuntarily separated from the service for reasons other than his misconduct, such employe shall be entitled to an annuity computed as provided in section 694a of this chapter payable from the civil service retirement and disability fund less a sum equal to 3½ per centum of such annuity; Provided, that when an annuitant hereunder attains the age which would have been the retirement age prescribed for automatic separation from the service applicable to such annuitant had he continued in the service to which retirement age, such deduction from the annuity shall cease. If and when any such annuitant shall be reemployed in the service of the District of Columbia or the United States (including any corporation the majority stock of which is owned by the United States) the right to the annuity provided by this section shall cease and the subsequent annuity rights of such person shall be determined in accordance with the applicable provisions of retirement law existing at the time of the subsequent separation of such person from the service."

tion of it was right. The District Judge thought the claim justiciable under the Tucker Act. He tried it under that Act and awarded plaintiff the judgment he sued for, not only a money judgment for the installments he claimed had accrued, but a declaratory judgment establishing his right to future installments. This appeal attacks the jurisdiction of the court to render any judgment. It attacks its jurisdiction to render a declaratory judgment in a proceeding under the Tucker Act. It attacks the judgment as erroneous on the merits, if rendered with jurisdiction, because it [fol. 71] allowed plaintiff to compute as part of the necessary thirty years, the seven years he served as deputy field marshal.

We think it clear that the jurisdictional points are well taken. The District Court of the United States as to claims under the Tucker Act, sits as a special tribunal exercising jurisdiction concurrent with the Court of Claims. U. S. vs. Pfitsch, 256 U. S. 547. When so sitting, it sits only to hear claims for actual damages on money demands. Perry vs. U. S., — U. S. —; Eugene Nortz vs. U. S., — U. S. —; Grant vs. U. S., 7 Wall. 331; Marion & Rye Ry. vs. U. S., 270 U. S. 280. Demands, with certain named exceptions, founded upon the Constitution and laws of the United States, upon a regulation of an executive department, or any contract, express or implied, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, of equity, or of admiralty, if the United States were suable.

The United States argues that whether the civil service retirement annuity plaintiff is suing for be regarded as contractual, as providing for insurance benefits, or gratuitous, as part of a pension scheme; whether it be regarded as founded on a law of Congress, or upon a regulation of an executive department, it is perfectly plain from the whole structure of the plan "for the retirement of civil service employes" and the provisions of the Acts putting it into effect, that no suable right is granted by those Acts, but on the contrary, their operation and application is a matter of administrative discretion and action, which may not be interfered with or controlled by court action. In short, that such claim or right as these statutes give is not a suable right, but one for administrative determination. It argues that such a claim stands as do applications for reinstate-

ment of lapsed policies under the World War Veterans Act, Meadows vs. U. S., 281 U. S. 271; claims to review special assessments of war and excess profits taxes, Wil-
[fol. 72] liamsport Wire Rope Co. vs. U. S., 277 U. S. 551; claims for additional compensation for transportation; U. S. vs. Atchison, Topeka & Santa Fe Ry., 249 U. S. 451; and claims in compensation cases, Silberschein vs. U. S., 266 U. S. 221; U. S. vs. Williams, 278 U. S. 255, and as those stood under the Act of March 3, 1885, providing compensation for losses of personal property suffered by officers in the army. U. S. vs. Babcock, 250 U. S. 328, entitled to purely administrative remedies to the exclusion of the courts. It argues that a consideration of the retirement legislation leaves no doubt of the Congressional intent to commit its administration to the executive processes and officers the Act names.

Beginning in 1920, the Congress instituted a complete administrative plan for the retirement on pay of civil service employes. This plan prescribes who should be eligible, fixed classes and the amounts applicable to each class. Provision is made for a deduction from the basic salary of each employe covered by the Act, in accordance with the procedure prescribed by the Comptroller General to be deposited in the Treasury "to the credit of the civil service retirement disability fund." Provision is made, too, for crediting these deductions to the employe's individual account, and for the repayment of such amounts under certain conditions. Sec. 703a, U. S. C. A., Title 5, provides that applications for annuities shall be in such form as the Commissioner of Pensions prescribes, and shall be supported by certificate from the head of the department in which the applicant has been employed. Sec. 717, U. S. C. A. Title 5, provides, "upon receipt of satisfactory evidence the Commissioner of Pensions shall forthwith adjudicate the claim of the applicant and if title to an annuity be established, a proper certificate shall be issued to the annuitant under the seal of the Department of the Interior." There is a provision, too, that any employe coming within the provisions of the retirement act shall be deemed to consent and agree to the deductions from his salary, and that pay-
[fol. 73] ment of the salary less such deductions shall be an acquittance of all claims and demands for all regular services, except the right to the benefits which they may be

entitled to under the retirement act. It is provided that the Civil Service Commission shall keep such record of appointments, transfers, etc., as may be deemed essential to the proper determination of rights under the retirement act, and shall furnish the Commissioner of Pensions such reports therefrom as he shall from time to time request as necessary to the proper adjustment of any claim for annuity. Provision is made for the appointment by the Commissioner of Pensions with the approval of the Secretary of the Interior, of three actuaries, to recommend to the Commissioner of Pensions such changes as may be from time to time necessary to protect the public interest and maintain the system on a sound financial basis, and to prepare tables for the Commissioner of Pensions for the purpose of computing annuities. By Sec. 708a, Title 5, it is provided that none of the moneys mentioned in any of the sections of the retirement act shall be assignable, either in law or equity, or be subject to execution, levy or attachment, garnishment or other legal process. Sec. 693a, Title 5, U. S. C. A., specifying who are eligible employees, provides, "this group shall include only those employes whose tenure of office is not intermittent or of uncertain duration." Sec. 707a, Title 5, U. S. C. A., provides, "for the purpose of administration, except as otherwise provided herein, the Commissioner of Pensions, under the direction of the Secretary of the Interior, is authorized and directed to perform, or cause to be performed, any and all acts and to make such rules and regulations as may be necessary and proper for the carrying of the provisions of the Act into effect. An appeal to the Secretary of the Interior shall lie from the final action or order of the Commissioner of Pensions affecting the rights or interests of any person or of the United States, the procedure on appeal to be as prescribed by the Commissioner of Pensions with the Sec-
[fol. 74] retary's approval." In addition, this section requires that the Commissioner of Pensions make a detailed comparative report annually as to receipts, disbursements and annuities, and that the Secretary of the Interior shall submit annually to the Bureau of the Budget estimates of the appropriation necessary to finance the retirement disability fund and to continue the said sections in full force and effect.

Appellee insists that by the Tucker Act Congress has given its consent generally that the United States be sued in all cases of this kind, and that no restriction upon the right to sue can be spelled out of the elaborate provisions for the setting up and administration of this plan. He argues that the provisions for deductions from their salaries and the other general provisions of the Act indicate an intent to create a contractual right entitling claimants to the judgment of a court. He argues, too, that even if it be considered that Congress has remitted, whether he is entitled to the annuity he claims, to the primary determination of administrative officers, and he would have no right of suit to control or compel their discretionary action, U. S. vs. Black, 128 U. S. 40; Works vs. Rives, 267 U. S. 175; U. S. vs. Williams, 278 U. S. 255, there is no question of discretion involved here. The facts he says, are admitted, the failure to act on those admitted facts is the failure to take that non-discretionary action which may be controlled by court order. Medbury vs. U. S., 173 U. S. 492; McLean vs. U. S., 226 U. S. 374; U. S. vs. Loftin, 249 U. S. 442.

We cannot agree with appellee that he may sue upon his claim. We think the legislation [shows, in the clearest kind of way, an intent to provide a general plan to be exclusively administered by those the statutes place in charge of it, an intent to provide only an administrative remedy. That such claims are intended to be, as far as their suability as claims is concerned, entirely withdrawn from court action. The fact that no other instance of an [fol. 75] attempt to control the administration of this plan and the fund provided by it by court action made during the fifteen years the plan has been in existence has been cited to us, tends, we think, to further support this view. Whether one whose right to an annuity certificate has been favorably adjudicated by the Commissioner may have mandamus to compel its issuance to him, or one to whom such a certificate has been issued, may, by mandamus, compel the payment to him of the moneys for which his certificate calls. Smith vs. U. S., 57 Fed. (2d) 998, or whether these claims are entirely withdrawn from judicial action as are decisions rendered by the administrator of veterans' affairs under the Act of March 20, 1933, Chap. 3, 48 Stats. 9, Lynch vs. U. S., 292 U. S. 587, is not before us. This is a suit

against the United States, and not a mandamus suit against an officer. Besides, we think it quite clear that there are matters, not of law, but of administrative discretion in applying the Act, involved in determining the right of one claiming an annuity under the plan which have not been resolved in plaintiff's favor, and the resolution of which may not be controlled by court action. The suit should have been dismissed.]

The judgment is reversed, and the cause is remanded with directions to dismiss the claim.

Foster, Circuit Judge, dissents.

[fol. 76] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 7675

UNITED STATES OF AMERICA

versus

FREDERICK D. DISMUKE

JUDGMENT—April 19, 1935

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to dismiss the claim.

"Foster, Circuit Judge, dissents."

[fols. 77-81] Petition for rehearing covering 5 pages filed May 8, 1935 omitted from this print. It was denied, and nothing more by order of May 29, 1935.

[fol. 82] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING REHEARING—May 29, 1935

As neither of the judges who concurred in the decision of the court in the above numbered and entitled cause is of opinion that the petition for rehearing should be granted, it is ordered that the said petition be and the same hereby is denied.

[fol. 83] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 84] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,753. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 199. Frederick D. Dismuke, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed July 1, 1935. Term No. 199 O. T. 1935.